Filed 9/30/10 (Original published opn. filed 8/31/10; *this supp. opn. is not certified for publication* and may not be cited or relied on under Cal. Rules of Court, rule 1115. Because it modifies an otherwise published opinion, this supp. opn. has been posted with the published opinions to facilitate tracking subsequent history of the 8/31/10 opn.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GREAT WEST CONTRACTORS, INC., Plaintiff and Appellant, v. IRVINE UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	G041688 (Super. Ct. No. 30-2008 00107122) SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Reversed and remanded.

Pitre & Teunisse, Patricia A. Teunisse and Carole M. Pitre for Plaintiff and Appellant.

Connor, Fletcher & Williams, Edmond M. Connor, Matthew J. Fletcher and Douglas A. Hedenkamp for Respondent.

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I

The Irvine Unified School District, now represented by new counsel and "sobered" by the main opinion in this case, has filed a remarkable petition for rehearing. The petition basically asks this court to require the trial court to order the District to now do what the main opinion says the District should have done all along -- give Great West, the lowest bidder on the Eastshore and Northwoods projects, a hearing on its responsibility. (See generally *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861 (*City of Inglewood*).)

Specifically, the District requests that this court modify the disposition of our opinion so that the trial court will order the District itself to give Great West a responsibility hearing. The District does not say how such a hearing would relate to either (1) Great West's request to amend its pleadings (which is the subject of the main opinion) or (2) any claims by Great West allowed under *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305 (*Kajima*).

The petition is remarkable precisely because a responsibility hearing was what the District argued *against* in its respondent's brief. On page 21, in the discussion portion of the respondent's brief and under the general heading, "the trial court correctly found in favor of the District regarding its bid decisions," there is a subheading specifically disclaiming the idea of a nonresponsibility hearing: "Appellant cannot save its claim by attempting to transform the District's determination into a finding of 'nonresponsibility.'" (Resp. br. at p. 14.)[1]

Under the "Appellant cannot save" subheading, the District's brief develops a theme that Great West was not entitled to a due process hearing. The brief clearly states: "There was no determination that Appellant was generally untrustworthy or that Appellant lacked the quality, fitness, capacity, and experience to satisfactorily perform public works contracts." (Resp. Br. at p. 23.)

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[1] In quoting from headings and subheadings from the Respondent's brief, we have converted words in all capitals and words capitalized that ordinarily would not be capitalized into normal English prose.

In fact, the respondent's brief is quite clear in arguing that the District properly rejected Great West's bids as non*responsive*, rather than nonresponsible: "The determination here was simply that the bid itself failed to provide information responsive to the requests in the Bid Packages on these Projects. The District made the quintessential responsiveness determination . . . ." (Resp. br. at p. 23.)

On page 25 of the respondent's brief, there is a single sentence, followed with a citation. We now quote the passage in full: "Finally, even if this Court were to conclude that 'responsibility' was an issue here, the trial court correctly determined that the result of such a conclusion would not be an award of the contract to Appellant, but merely the ordering of a hearing on the issue of responsibility. (IV JA 1100.) (See *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.* (2007) 146 Cal.App.4th 757, 771 (the remedy for public entity's failure to analyze an issue regarding responsibility was to order the public entity to conduct a hearing, not to award the subject contract to the plaintiff contractor).)" The passage, interestingly enough, was the *sole* mention of the *D.H. Williams* decision in the District's brief.

New arguments generally cannot be raised for the first time in a petition for rehearing. (E.g., *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 391, fn. 10 ["Issues raised for the first time on appeal or rehearing will normally not be considered."]; *Cornelius v. Los Angeles County Etc. Authority* (1996) 49 Cal.App.4th 1761, 1778, fn. 7 ["Cornelius did not raise this argument until he filed his petition for a rehearing. Points made for the first time on a petition for rehearing are not considered."]; Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 12:25, p. 12-5 (Eisenberg Rutter Guide) ["New arguments and authorities generally *cannot* be asserted for the first time in a petition for rehearing and will be disregarded by the court."].)

The threshold question before us, then, is whether the one-sentence statement that appeared in the middle of page 25 of the District's brief was enough to raise the issue of whether the decision in *D.H. Williams*, as it applies in this case, *requires* this court to direct the trial court to order the District to conduct a responsibility hearing.

We conclude the answer is no. If the District wanted to hedge its bet given the possibility of reversal, it should have said so by way of a properly-segregated, discrete heading. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 294 ["Mona's brief also suggests that Ulf is precluded from complaining because he did not make a sufficient objection in the trial court or an offer of proof as to what additional evidence he would have put on had the trial not been aborted summarily. Because this argument is not presented under a separate heading, it is forfeited."]; *In re Mark B.* (2007) 149 Cal.App.4th 61, 67 fn. 2 ["Wolff claimed Wilson lacked standing because he was not a party or an attorney for a party. On appeal, she purports to renew this argument, but her opening brief fails to raise it under a proper heading. Accordingly, it is forfeited."].)

Here, the heading and subheading under which the District's oblique allusion to a responsibility hearing appears admitted no possibility of reversal. In the context of the respondent's brief (and as we read the passage the first time), the point of the citation to *D.H. Williams* is that the *trial court was correct* not to allow Great West to amend its pleadings because *all* it could get was a hearing exonerating it from the nonresponsibility charge. There is no request asking for a certain disposition on remand in the event of reversal. Arguments made under topic headings that are materially different from those topic headings are waived. (See *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345, fn. 17 [noting heading was under topic of equitable estoppel and argument was that statute of limitations was subject to equitable tolling, thus equitable tolling argument had been waived].)

II

We do, however, have the discretion to consider new points raised in a petition for rehearing when there is good cause. (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 120-121 [explaining that court granted respondent's petition for rehearing to consider the constitutionality of dispositive statute because, although raised for the first time on rehearing "we may do so for good cause, and the validity of the

dispositive statute constitutes good cause"].) But there is a very good reason *not* to consider this new point in this petition for rehearing: It is premature.

Unlike *D.H. Williams*, this case has not come to us by way of an appeal from a judgment in favor of a wronged contractor challenged by the public entity. Thus the appellate court in *D.H. Williams* could readily provide for a due process hearing in lieu of a direct award of the contract. Here, the only outstanding matter that Great West *could* challenge that would have an effect on the disposition of the case was the matter of whether it could have another chance at seeking to amend its pleading. The main opinion thus reflects this limited focus: "Under *Kajima*, Great West *may* be entitled to recover its bid preparation costs, depending, of course, on what the results of the hearing to which it was entitled would have been. [¶] But that claim is getting ahead of ourselves. *For the moment*, all we have to do is ascertain whether the trial court abused its discretion in rejecting Great West's admittedly belated request to amend." (Slip opn. at p. 37, second italics added, footnote omitted.)

It may be that, under the logic of our opinion, the trial court will have to decide whether to order the District, at some stage of the proceedings, to hold a responsibility hearing. If and when it does, *that* determination can be reviewed in due course. It would require too much speculation now to decide the issue on this record.[2]

III

That leaves the matter of the District's favoritism, expressly articulated in the main opinion and bolstered with allusions to Boss Tweed and Tammany Hall. Not surprisingly, the rehearing petition takes great exception to such comments. On reflection, we think they should stand.

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[2] Consider some of the permutations that come to mind at this stage of proceedings: (1) trial court rehears request to amend, denies request; (2) trial court rehears request to amend, grants request, and as part of consideration of Great West's "*Kajima* claim" orders District to hold responsibility hearing preparatory to determination of the merits of the claim; (3) trial court, prior to formal hearing on request to amend, orders District to hold responsibility hearing, and considers request to amend in light of that hearing; (4) trial court hears District's request to hold responsibility hearing prior to request to amend, and denies District's request and proceeds to consider request to amend. Etcetera.

One argument proffered by the District's new counsel in favor of deleting those allusions must be soundly and publicly rejected: The argument is that the language is "likely to be used as ammunition for political attacks on the School District's elected officials." (Petn. for Rehg. at p. 10.) If that idea -- don't say anything that makes elected officials look bad -- were to become some kind a kind of informal rule in judicial opinion writing, it would mean there would be one law for ordinary private litigants and another law for elected officials. Courts cannot be respecters of persons, elected or not.

The District appears to have forgotten that California's public contracting laws *are directed at public entities headed by elected officials*. Indeed, the main purpose for California's public bidding laws requiring award of projects to the lowest bidder is *precisely* to guard against Tammany-style favoritism and the "honest graft" of giving one bidder an advantage via inside information.

As our high court has famously said in *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173: "As one leading treatise explains: 'The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, *to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable*, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. . . . Thus, charters requiring competitive bidding are not to be given such a construction as to *defeat the object of insuring economy and excluding favoritism and corruption*." (Italics added.)

Indeed, as the Supreme Court said in *Kajima*, the Legislature itself declared, in section 100, subdivisions (b) through (d) of the Public Contract Code, that its intent in enacting the code was to protect the public from the misuse of public funds, provide all qualified bidders with a fair opportunity to enter the bidding process, and

eliminate fraud, favoritism and corruption in the award of public contracts. (*Kajima, supra*, 23 Cal.4th at p. 314.)[3]

The District also argues that, given that there never really was a hearing on Great West's responsibility, references to favoritism (or even the fact that the District paid more than $800,000 over Great West's lowest bids[4]) should be deleted.

The argument ignores the record that *was* presented both to the trial court and to this court, and in particular the uncontroverted difference in the way Great West was treated in terms of information from the District -- a difference in information that *did* materially prejudice Great West's ability to present its claim to the trial court. Thus, even if, for sake of argument, the District might have been within its rights to have determined that Great West was not responsible in some hypothetical responsibility hearing, *this* record clearly shows that Construct 1 had access to Great West's bid the day after the bids were opened -- as shown by its bid challenge -- but the District did not turn over other competitors' bids to Great West until *after* the crucial June 3 hearing, despite the fact that Great West made a written request for them on May 21.

Moreover, the District's own brief virtually invited the Tammany allusions with its argument in relation to the mootness issue that Great West had not alleged a "systemic practice repeatedly harming the public fisc." (Resp. Br. at p. 12.) In fact, Great West had alleged such harm by way of the District's using a double standard when it came to what it considered nonresponsive.

And while -- as we point out in the main opinion -- those allegations have yet to be determined on the merits, the District can hardly be heard to complain about their obvious implications.

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[3] The Court of Appeal has similarly noted that the purpose of public contracting laws is to protect against favoritism and corruption, including, just recently: *Schram Construction, Inc. v. Regents of the University of California* (2010) 187 Cal.App.4th 1040, 1053-1054 [considering bidding statutes "in light of the purpose for which they were enacted," namely "'to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable'"]; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1224 ["Those laws invite competition; guard against favoritism, improvidence, extravagance, fraud, and corruption; and secure the best work at the lowest price practicable."].)

[4] $800,000 is not small change, even for a public entity.

Finally, while we take no pleasure in noting this, we have found no cases in our survey of California public bidding cases mentioned in the main opinion in which the actions of the relevant public entity looked as bad as they do here.

Although we modify the main opinion to properly qualify what the *D.H. Williams* court did vis-à-vis the trial court judgment in that case, we decline to grant rehearing.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.